Supreme Court, U.S.
FILED
JUL 07 2000
CLERK

No. 99-1185

In the Supreme Court of the United States

MARK SELING, SUPERINTENDENT,
SPECIAL COMMITMENT CENTER,

PETITIONER,

v.

ANDRE BRIGHAM YOUNG,

RESPONDENT.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CALIFORNIA ATASCADERO STATE HOSPITAL SECTION 6600 CIVIL COMMITTEES IN SUPPORT OF RESPONDENT

JOEL E. KRISCHER*
KATHRYN M. DAVIS
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

* Counsel of Record for *Amicus Curiae* California Atascadero State Hospital Section 6600 Civil Committees

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTERESTS OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. *Kansas v. Hendricks*: The Constitutional Significance of the "Mental Abnormality" Standard	4
II. Lack of Volitional Control Is Constitutionally Required	8
A. Substantive Due Process	9
B. Ex Post Facto and Double Jeopardy	15
C. State Legislatures and the Lower Courts Have Failed to Require Lack of Volitional Control	18
D. Application to Mr. Young of the Washington Act Violates the Constitution	22
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Illinois,
478 U.S. 364 (1986) 6, 18, 24

Calder v. Bull,
3 Dall. 386, 1 L. Ed. 648 (1798) 15

Collins v. Youngblood,
497 U.S. 37 (1990) 15

Ex Parte Lange,
18 Wall. 163 (1873) 16

Foucha v. Louisiana,
504 U.S. 71 (1992) ..... 4, passim

Heller v. Doe,
509 U.S. 312 (1993) 6, 24

Hubbart v. Superior Court,
969 P.2d 584 (Cal.), *petition for cert. filed*,
No. 98-9130 (Apr. 27, 1999) 11, 17, 20

In re Linehan,
594 N.W.2d 867, 887 (Minn.),
cert. denied sub nom. Linehan v. Minnesota,
120 S. Ct. 587 (1999) 9, 14, 18, 19

In re the Detention of Brooks,
973 P.2d 486 (Wash. Ct. App.),
review granted sub nom. Brooks v. State,
989 P.2d 1136 (Wash. 1999) 23

Jones v. United States,
463 U.S. 354 (1983) 5

Kansas v. Hendricks,
521 U.S. 346 (1997) ..... 2, passim

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 15

TABLE OF AUTHORITIES

Page(s)

M'Naghten's Case,
1843-60 All E.R. 229 (H.L. 1843) 14

Minnesota ex rel Pearson v. Probate Court of Ramsey County,
309 U.S. 270 (1940) 6, 19

North Carolina v. Pearce,
395 U.S. 711 (1969) 16

Post v. Oldakowski,
541 N.W.2d 115 (Wis. 1995) 9, 10

Schall v. Martin,
467 U.S. 253 (1984) 10

Washington v. Yakima Indian Nation,
439 U.S. 463 (1979) 22

Young v. Weston,
192 F.3d 870 (9th Cir. 1999),
cert granted sub nom. Seling v. Young,
120 S. Ct. 1416 (2000) 23

STATUTES

42 U.S.C. § 1983 1

ARIZ. REV. STAT. ANN. § 36-3701(5) (West 1999) 21

CAL. WELF. & INST. CODE § 6600 1

FLA. STAT. ANN. § 394.912(5) (West 1999) 20

ILL. COMP. STAT. § 207/5(b) (West 1999) 20

IOWA CODE ANN. § 229A.2(4) (West 1999) 20

KAN. STAT. ANN. § 59-29a01 (1994) 5

KAN. STAT. ANN. § 59-29a02(b) (West 1999) 20

MASS. GEN. LAWS, ch. 6, § 178C (1999) 20

MINN. STAT. ANN. § 253B.02(18)(c) (West 1999) 20

MINN. STAT. ANN. § 253B.02(18)(c)(b) (West 1999) 19

TABLE OF AUTHORITIES

Page(s)

MO. ANN. STAT. § 632.480(2) (West 1999) 20
N.D. CENT. CODE § 25-03.3-01(7) (1999) 20
N.J. STAT. ANN. § 30:4-27.26 (West 1999) 20
S.C. CODE ANN. § 44-48-30(1)(b) (1999) 20
STATS. 1995, ch. 763, § 1 11
TEX. HEALTH & SAFETY CODE ANN. § 841.002(2) (West 1999) 20
VA. CODE ANN. § 37.1-70.1 (Michie 1999) 20
WASH. REV. CODE ANN. § 71.09.020(2) (West 1999) 10, 22
WIS. STAT. ANN. § 980.01(2) (West 1999) 20

OTHER AUTHORITIES

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) 14, 21
MODEL PENAL CODE § 4.01(1) (1985) 14

TREATISES

Carol S. Steiker, *Forward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998) 13, 14
David L. Faigman *et al.*, *Modern Scientific Evidence: The Law and Science of Expert Testimony*,
Ch. 6 *Insanity and Diminished Capacity*, § 6-1.2.4 14
Ch. 7 *Predictions of Dangerousness*, § 7-2.0 10
Ch. 36 *Sexual Aggressors*, § 36-1.0 (1997) 9, 10
Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons From Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279 (1998) 6, 8, 12

TABLE OF AUTHORITIES

Page(s)

J. Monahan & Henry J. Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*, 51 AM. PSYCHOL. 931 (1996) 10
John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999) 13
Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996) 12
Thomas Paine, *Dissertation on First Principles of Government*, in *The Complete Writings of Thomas Paine* 588 (Philip S. Froner ed. 1945) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 16

In the
Supreme Court of the United States

MARK SELING, SUPERINTENDENT,
SPECIAL COMMITMENT CENTER,

PETITIONER,

v.

ANDRE BRIGHAM YOUNG,

RESPONDENT.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CALIFORNIA ATASCADERO STATE HOSPITAL SECTION 6600 CIVIL COMMITTEES IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae is a group of approximately 300 men who are currently confined at the Atascadero State Hospital pursuant to California's Sexually Violent Predator Act (*see* CAL. WELF. & INST. CODE § 6600 *et seq.*) in a pending class action brought pursuant to 42 U.S.C. Section 1983.[1] Like Mr. Andre Brigham Young, *Amicus* alleges, *inter alia*, that

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authorized this brief, in whole or in part, and that no person or entity, other than *Amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this *Amicus* brief.

the conditions of confinement at Atascadero State Hospital violate three separate provisions of the United States Constitution: substantive due process, the guarantee against double jeopardy, and the Ex Post Facto Clause.

This Court's determination of the constitutional questions at issue here is directly relevant to the ultimate resolution of *Amicus'* currently pending claims because California's Sexually Violent Predator Act tracks the language of the Washington statute's definition of "mental abnormality."

Amicus submits this brief in support of Respondent, Mr. Young, and respectfully urges this Court to clarify that, as the term "mental abnormality" was defined in *Hendricks*, before indefinite involuntary civil commitment can be justified, an individual must be shown to be dangerous and to lack volitional control over his actions. *Amicus* further urges the Court to affirm the holding of the Ninth Circuit's decision in this case.

SUMMARY OF ARGUMENT

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court reaffirmed that substantive due process requires proof of dangerousness, coupled with proof of some additional factor, such as "mental illness" or "mental abnormality," before indefinite involuntary civil detention can be justified. While it rejected the argument that a finding of "mental illness" was a necessary constitutional predicate for civil commitment, the Court concluded that a finding of "mental abnormality" under the statute in question passed constitutional muster because it limited confinement to "those who are unable to control their dangerousness." *Id.* at 358.

While the Court noted that the task of defining legally significant terms of a medical nature is one that is traditionally left to legislatures, nothing in the Court's opinion suggests that it intended to abandon constitutional limits on what legislatures may adopt for their definitions of

those terms. To the contrary, the majority opinion in *Hendricks* stressed the significance of the lack of volitional control standard no less than ten distinct times. Justice Kennedy's concurring opinion also underscored the importance of the constitutional content of the "mental abnormality" requirement. *Id.* at 373. Even Justice Breyer, though dissenting from other parts of the Court's opinion, joined the majority's rejection of Hendricks' substantive due process claim on the basis that Hendricks suffered from a "classic case of irresistible impulse" such that he could not control his urge to molest children. *Id.* at 376 (Breyer, J., dissenting).

To the extent that *Hendricks* could be viewed as not expressly holding that lack of volitional control is a constitutionally required predicate to civil commitment, *Amicus* respectfully submits that the Court should take this opportunity to do so now. The constitutional significance of the lack of volitional control requirement cannot be overstated. Without it, states are unconstrained and free to impose indefinite involuntary civil commitment upon proof of future dangerousness alone. Such a standard fails to comport with substantive due process and contravenes the express holdings of this Court. Additionally, absent proof of a volitional impairment, civil confinement becomes a mechanism for retribution and general deterrence, rendering it a punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

The acts of the state legislatures and the decisions of the lower courts since *Hendricks* have unfortunately failed to define with sufficient precision the mental abnormality requirement and, in so doing, have failed to recognize the constitutional significance of the volitional control standard. As a result, legislatures are defining out of existence the constitutional content of the mental abnormality term, such that substantive due process now turns on mere predictions

of future violence. More importantly, absent proof of lack of volitional control, the stated *purposes* of the initial and continuing commitment—namely, treatment and protection from dangerousness—bear absolutely no relationship to the *nature* of the confinement itself. Where there is no volitional impairment, but only a prediction of violence, there is no illness to treat, and involuntary commitment resembles more closely a punitive, arbitrary exercise of power. In this way, conditions of confinement are inextricably linked to the reasons for commitment itself, such that failure to define with sufficient specificity the mental abnormality standard can render a commitment scheme unconstitutional both on its face, and as applied.

Washington's sexually violent predator statute, as it is construed and implemented, evidences such a punitive purpose and effect, and illustrates that the ostensibly legitimate goal of treatment can be but a pretext for punishment. As a result, Washington's failure to define, and apply to Mr. Young, with sufficient precision the "mental abnormality" standard violates the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the United States Constitution.

Accordingly, *Amicus* respectfully urges the Court to clarify the constitutional role for mental abnormality as it was defined in *Hendricks*, reiterate the constitutional significance of lack of volitional control, and affirm the judgment of the Ninth Circuit in this case.

ARGUMENT

I. *KANSAS V. HENDRICKS*: THE CONSTITUTIONAL SIGNIFICANCE OF THE "MENTAL ABNORMALITY" STANDARD

In *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court struck down as unconstitutional a Louisiana law that required criminal defendants who were found not guilty by reason of insanity to remain in a psychiatric hospital until the person acquitted could prove that he was no longer

dangerous, regardless of whether he was still insane. This Court held that proof of dangerousness, standing alone, is constitutionally insufficient to justify forcible civil detention, finding that due process requires that an insanity acquitee may remain incarcerated only "'as long as he is both mentally ill and dangerous, but no longer.'" *Id.* at 77 (quoting *Jones v. United States*, 463 U.S. 354, 368 (1983)).

Relying on *Foucha*, the plaintiff in *Hendricks*, challenged the constitutionality of his civil commitment under Kansas' Sexually Violent Predator Act, which provides for the involuntary civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a01 *et seq.* (1994). Mr. Hendricks, a diagnosed pedophile with an *admitted* inability to control his dangerous sexual behavior, alleged that, because commitment under Kansas' statute was predicated only on the existence of a "mental abnormality" rather than a "mental illness," the application of the law to him violated the United States Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses. *See Hendricks*, 521 U.S. at 355-56.

Writing for the majority, Justice Thomas rejected these challenges and concluded that nothing in *Foucha* established as a constitutional predicate for commitment any categorical requirement of both "mental illness" and dangerousness. While recognizing that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," Justice Thomas concluded that the Court had never required state legislatures to adopt any particular nomenclature in drafting civil commitment standards, and that the term "mental illness," as it was used in *Foucha*, was devoid of any "talismanic significance." *Id.* at 358-59. *Foucha* was read as fitting within the context of other cases, establishing only that proof of dangerousness must be coupled "with the proof

of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358.[2] Significantly, however, the Court also concluded that, like "mental illness," a finding of "mental abnormality" satisfies substantive due process because "it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness*." *Id.* (emphasis added).

Thus, while the Court in *Hendricks* recognized that the task of defining legally significant terms of a medical nature is one that is traditionally left to legislatures, nothing in the Court's opinion suggests that it intended to abandon constitutional limits on what legislatures may adopt for their definitions of those terms. To the contrary, the Court repeatedly suggested that the constitutional touchstone for civil commitment had to be a lack of volitional control. The Court stressed the significance of the lack of volitional control standard no less than ten separate times.[3] For example, in describing the involuntary civil commitment statutes it had previously upheld, the Court noted that those laws narrowly provided "for the forcible civil detainment of people who are unable to control their behavior." *Hendricks*, 521 U.S. at 357. Similarly, in upholding the Kansas Act, the Court stated that "[t]he precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of

---

[2] Quoting *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual). The Court also cited *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual), and *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 271-72 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality").

[3] *See* Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons From Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1281 & n.13 (1998) [hereinafter "Janus"].

persons eligible for confinement to those who are unable to control their dangerousness." *Id.* at 358. Perhaps most significantly, the Court based its opinion on the fact that Hendricks was a diagnosed pedophile with an admitted inability to control his dangerous sexual behavior and concluded that:

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.

Hendricks, 521 U.S. at 360.

In essence, the Court in *Hendricks* implied, if it did not expressly hold, that before a state may subject an individual to involuntary civil commitment, the Constitution requires a finding that the individual's mental illness or abnormality has rendered him unable to control his sexually dangerous behavior. In so holding, the Court reaffirmed its holding in *Foucha*, and recognized that "mental abnormality" and "mental illness" are constitutional functional equivalents, in that each serves to restrict the reach of the state's power of civil commitment to that limited subclass of dangerous persons who are unable to control their behavior. *See Hendricks*, 521 U.S. at 358.

Justice Kennedy's concurring opinion underscored the importance of the constitutional content of the "mental abnormality" requirement and sounded a warning for the future if the lower courts' scrutiny were to become too lax. Limiting his conclusion to the facts before the Court, Justice Kennedy's reasoned:

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental

> abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Id at 373 (Kennedy, J., concurring). Even Justice Breyer, though otherwise dissenting, joined the majority's rejection of Hendricks' substantive due process claim on the basis that Hendricks suffered from a "classic case of irresistible impulse" such that he could not control his urge to molest children.[4] *Id.* at 376 (Breyer, J., dissenting).

In the case now before this Court, both the Court's emphasis on the importance of an individual's inability to control his behavior and Justice Kennedy's admonition about the need for vigilance in that regard should not go unheeded.

II. LACK OF VOLITIONAL CONTROL IS CONSTITUTIONALLY REQUIRED

To the extent *Hendricks* could be viewed as not expressly holding that lack of volitional control is a constitutionally required predicate to civil commitment, *Amicus* respectfully submits that the Court should take this opportunity to do so now.

The constitutional significance of the lack of volitional control requirement cannot be overstated. As set forth in *Hendricks* and *Foucha*, civil commitment based on mere predictions of violence undoubtedly contravenes the express holdings of this Court. It is no accident, therefore, that *Hendricks* repeatedly returned to the volitional control requirement, because that requirement has constitutional significance for, and is determinative of, the resolution of constitutional challenges brought pursuant to three separate provisions of the Constitution: substantive due process, the

[4] Justice Breyer unambiguously conceded the significance of volitional control and focused on it directly no less than four times. *See* Janus, *supra*, note 3.

guarantee against double jeopardy, and the Ex Post Facto Clause.

A. Substantive Due Process

As a substantive requirement beyond proof of dangerousness, and without the limiting principle of volitional control in place, "mental abnormality" is not a very well-defined concept. *See* David L. Faigman *et al.*, *Modern Scientific Evidence: The Law and Science of Expert Testimony*, Ch. 36 *Sexual Aggressors*, § 36-1.0, at 75 (1997) [hereinafter "Faigman"]. Like the concept of "insanity," "mental abnormality" is a "term of legal convenience" created by state legislatures and does not necessarily "correspond to any psychological construct or specific diagnosis." *Id.*

Thus, absent the constitutionally imposed requirement of lack of volitional control, precommitment statutory standards of "mental abnormality" are illusory and incapable of any meaningful or limiting definition.[5] As Professor Faigman has observed,

> If, in fact, lack of "volitional control" is not a prerequisite to commitment in [Washington] or elsewhere, then only a finding of "mental abnormality" is required. The question remains, then, what does this term mean? Without the volitional component, the "additional factor" of mental abnormality appears to have no content. It is whatever the legislature says it is.

Faigman, *supra*, at 77; *see also In re Linehan*, 594 N.W.2d 867, 887 (Minn.), *cert. denied sub nom. Linehan v. Minnesota*, 120 S. Ct. 587 (1999) ("*Linehan IV*") (Page, J.,

[5] Indeed, "[i]f the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing." *Post v. Oldakowski*, 541 N.W.2d 115, 142 (Wis. 1995) (Abrahamson, J., dissenting).

dissenting); *Post v. Oldakowski*, 541 N.W.2d 115, 142-43 (Wis. 1995) (Abrahamson, J., dissenting).

More specifically, absent a requirement of volitional impairment, involuntary civil commitment is justified on the basis of mere predictions of future violence, and nothing more. To illustrate, Washington's statute provides, in pertinent part, that mental abnormality means:

> [A] congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

WASH. REV. CODE ANN. § 71.09.020(2) (West 1999).

If, then, mental abnormality does not mean lack of volitional control, a person is mentally abnormal because he is dangerous, and nothing more.[6] On that reasoning, "a person can be committed if he is both dangerous and dangerous." Faigman, *supra*, at 77. Such a standard is constitutionally flawed for several reasons.

First, it is precisely the standard that *Hendricks* and *Foucha* expressly forbid. In upholding the Kansas Act at issue in *Hendricks*, this Court expressly recognized that it did so on the basis that the statute requires a finding of future dangerousness, "and then *links* that finding to the existence of a 'mental abnormality' or 'personality disorder,'" conditions unequivocally associated with lack of volitional control. *Hendricks*, 521 U.S. at 358 (emphasis

---

[6] For purposes of this brief, we assume, as we must, that predictions of dangerousness are achievable. *See Schall v. Martin*, 467 U.S. 253, 278 (1984) (observing that "*from a legal point of view* there is nothing inherently unattainable about a prediction of future criminal conduct") (emphasis added). Nonetheless, they are not always so. *See generally*, J. Monahan & Henry J. Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*, 51 AM. PSYCHOL. 931 (1996); Faigman, *supra*, Ch. 7 *Predictions of Dangerousness*, § 7-2.0, at 308-18.

added). According to the Court, the likelihood of future dangerousness must be a *product* of a volitional impairment; mere predictions of violence simply cannot suffice.

Second, in the absence of a volitional control requirement, definitions of "mental abnormality" and "mental disorder," as they are legislatively defined, are circular and, therefore, without meaning. *See Hubbart v. Superior Court*, 969 P.2d 584, 611-12 (Cal.) (Werdegar, J., concurring), *petition for cert. filed*, No. 98-9130 (Apr. 27, 1999) (recognizing that the inherently tautological nature of the "mental abnormality" standard, as it is legislatively defined, implicates dangers alluded to in *Foucha*).

An analogous provision of California's Sexually Violent Predator Act proves the point. In describing the additional factor its law couples with the dangerousness component, the California Legislature has declared that:

> The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior.

STATS. 1995, ch. 763, § 1 (*quoted in Hubbart*, 969 P.2d at 587 n.5). On that state's reasoning, sexual predators are dangerous because they have a mental disorder, and they have a mental disorder because they are violent. *See* Faigman, *supra*, at 77 n.32.

Third, and in a related vein, if substantive due process does not require proof of lack of volitional control, civil confinement becomes a mechanism for retribution and general deterrence, as it punishes people for being merely "bad," rather than for being "mad." However, constitutional principles dictate that such punitive goals are reserved for the criminal system alone. *See Hendricks*, 521 U.S. at 378 (Breyer, J., dissenting). As Professor Morse has recognized, "if anyone who has a tendency to engage in sexual violence is abnormal, then the term 'mental abnormality' is circularly

defined and does no independent conceptual or causal work. Moreover, such a definition collapses all badness into madness." Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 137 (1996).

Fourth, and perhaps even more fundamentally, the failure to recognize volitional control as a limiting principle impermissibly eliminates the boundary between civil commitment and criminal liability.[7] With respect to those who commit sexually violent acts, legitimate objectives of civil commitment include: (1) prospectively protecting the health and safety of the community; and (2) providing treatment and rehabilitation for the individual committed. *See Hendricks*, 521 U.S. at 357. Alternatively, legitimate state objectives for imposing criminal liability include punishment and retribution, and accordingly, states may imprison sexual offenders who choose to violate the law. *See Foucha*, 504 U.S. at 80.

It follows, then, that detention by way of civil commitment to confine those who cannot control their behavior is a legitimate exercise of the police power and furthers legitimate goals of protection and treatment. Nonetheless, the Constitution does not permit preventive detention in the criminal context, because the state may not punish an individual on the basis of mere predictions of dangerousness alone. *See Foucha*, 504 U.S. at 83 (recognizing that civil commitment without proof of current mental illness would be but a step away "from substituting confinements for dangerousness for our present system,

---

[7] As Professor Janus points out, preserving the constitutional distinction between civil and criminal proceedings is particularly important insofar as "[c]ivil commitment laws deprive people of their liberty, but do not demand the strict procedural and substantive protections of the criminal law." Janus, *supra*, at 1279 n.2; *see also Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) (describing more broadly the relevant constitutional question as whether the civil or criminal system is the appropriate mechanism for imposing upon sexually violent persons otherwise legitimate social controls).

which, with only narrow exceptions . . ., incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law").

Accordingly, in order to preserve the constitutional distinction between civil commitment and criminal liability, something more than dangerousness must be shown—namely, that an individual lacks the capacity to control his sexually dangerous behavior. *See Hendricks*, 521 U.S. at 358; *see also* Carol S. Steiker, *Forward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 785-92 (1998) [hereinafter "Steiker"]. Indeed, justifying involuntary commitments in cases where a person *chooses* to engage in a criminal act fails to preserve the constitutional distinction between criminal and civil proceedings and constitutes an impermissible, unconstrained exercise of police power. *See* Janus, *supra*, at 1284. That failure leaves unchecked civil commitment schemes that sweep within their reach *all* sexually dangerous criminals, which, in turn, renders such detention punitive in both purpose and effect. *See, e.g.*, John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999).

Thus, legislatures must reserve indefinite civil commitment for those who are truly incapable of choosing to understand or comply with the law because "those able to so choose should have their liberty and their autonomy respected by being treated as rational beings—and thus prosecuted pursuant to the criminal law should they choose to do wrong." Steiker, *supra*, at 785. The greater control an individual exercises over his behavior, the more he is responsible for the consequences. This is a basic premise of American criminal law. If a person truly cannot control his behavior, he is more likely to escape criminal punishment

under doctrines of excuse, such as insanity.[8] This lack of control also justifies civil intervention, as occurred in *Hendricks*. But for those who can control their actions, it is the criminal system, not the civil, that operates to deter them from, and hold them responsible for, dangerous conduct.

Lastly, absent a requirement that an individual must be found to be dangerous beyond his volitional control, legislatively defined standards of "mental abnormality" cannot be narrowly tailored to further legitimate state objectives, since every sexually dangerous individual would be subject to forcible civil detention, whether or not he is dangerous beyond his control.[9] *See* Steiker, *supra*, at 786 (stating that "virtually all of those who choose to commit criminal acts ... can be considered 'abnormal'"); *see also Linehan IV*, 594 N.W.2d at 881 n.9 (Page, J., dissenting) (observing that the "lack of adequate control" standard "would allow the state to indefinitely commit any class of individuals who have a record of past harmful conduct, suffer from a mental illness or mental abnormality, and who will likely engage in harmful conduct in the future"). At some

---

[8] It should be noted, however, that the predominant test of insanity in the United States, the *M'Naghten* "right/wrong" test, does not have a volitional control element. Under the *M'Naghten* test, a defendant is excused if he did "not ... know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 1843-60 All E.R. 229, 233 (H.L. 1843). The American Law Institute's test for insanity, in contrast, contains both cognitive and volitional prongs: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 4.01(1) (1985); *see generally* Faigman, *supra*, Ch. 6 *Insanity and Diminished Capacity*, § 6-1.2.4, at 227.

[9] That result is compounded by the sweeping list of mental disorders included in the DSM-IV, such as anorexia, bulimia, insomnia, agoraphobia, and caffeine-induced anxiety disorder. *See* American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 213, 396, 439, 539-57 (4th ed. 1994) ("DSM-IV").

level, virtually every criminal offender has failed to exercise volitional control over his behavior. The relevant constitutional question, however, and the only meaningful mechanism for distinguishing among offenders, is whether those individuals who *failed* to exercise control also lacked the volitional *capacity* to do otherwise. Absent such a finding, civil commitment statutes cast a wide net designed both in purpose and effect to confine all sexually dangerous persons, without regard for any additional factor. *Cf. Hendricks*, 521 U.S. at 357 (stating that involuntary civil commitment is justified where it is restricted to a *limited subclass* of dangerous persons).

B. Ex Post Facto and Double Jeopardy

> An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach to himself.

Thomas Paine, *Dissertation on First Principles of Government*, in *The Complete Writings of Thomas Paine* 588 (Philip S. Froner ed. 1945).

The Ex Post Facto Clause prohibits laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Its fundamental purpose is to ensure fair warning of the consequences of violating penal statutes and to reduce the potential for vindictive legislation. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). A law also violates the Ex Post Facto Clause if it inflicts upon a person a greater punishment than did the law annexed to his crime at the time the crime was committed. *See Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (1798).

The Double Jeopardy Clause provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. That provision protects persons not only from a second trial for the same offense, but also "'prevent[s] the criminal from being twice punished for the same offense.'" *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969) (quoting *Ex Parte Lange*, 18 Wall. 163, 168 (1873).

The key to analyzing whether statutory definitions, both as they are construed and judicially applied, violate the guarantee against double jeopardy and the Ex Post Facto Clause is the determination of whether those provisions are civil or criminal in nature. *See Hendricks*, 521 U.S. at 361. That determination, in turn, depends on whether or not the challenged law operates as a punishment. *See id.* at 361.

In assessing the punitive nature of the Kansas commitment scheme, the Court in *Hendricks* considered whether that statute was punitive in purpose or effect. *See id.* In concluding that it was not, the Court rejected the contention that the Kansas Legislature "intended the Act to function as a deterrent." *Id.* at 362. According to the Court, the principal reason for its conclusion was its construction of the mental abnormality requirement. Specifically, as the Court explained:

> Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or "personality disorder" *that prevents them from exercising adequate control over their behavior.* Such persons are therefore unlikely to be deterred by the threat of confinement.

Id. at 362-63 (emphasis added).

As the Court recognized, where a sexually dangerous individual lacks the capacity to control his sexually dangerous behavior, he is by all accounts, incapable of being deterred. In such cases, civil commitment, under certain

narrow circumstances, may be justified. *See id.*; *see also Hubbart*, 969 P.2d at 515.

In sharp contrast, where a sexually dangerous individual fails *by choice* to exercise volitional control over his criminal acts, he can be deterred from committing future acts of misconduct through the imposition of facially civil sanctions. *Cf. Hendricks*, 521 U.S. at 362-63. If he is capable of being deterred, then the attempt to do so looks like punishment. Similarly, if commitment is not based on a finding of volitional impairment, then it resembles more closely commitment based on a criminal intent. *Cf. id.* That evinces the other traditional aim of punishment: retribution.

The same circularity noted above also applies in the ex post facto and double jeopardy contexts. Absent a requirement of lack of volitional control, all "badness" is collapsed into "madness." As a result, civil detention is no longer justified on the basis of treatment and protection, but rather, resembles more closely a mechanism for retribution and deterrence, in that it punishes people who are merely bad, rather than treating people who are mad. *See Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

It follows then that where state legislatures fail to define "mental abnormality" in a way that requires proof of substantial lack of volitional control and, more importantly, where courts fail to require that such a precommitment showing be made, those who are capable of exercising some meaningful degree of control over their actions will be deterred by the threat of civil commitment, which, in turn, becomes but a mere pretext for punishment.

Perhaps even more importantly, absent proof of volitional impairment, both the initial and continuing confinement of sexual offenders is based solely on proof of future dangerousness. If, however, treatment and protection from dangerousness are the expressed legislative goals—and, notably, the *only* legitimate objectives for state-imposed civil commitment—then the stated reasons

for the confinement bear absolutely no relationship to the nature of the confinement itself. Indeed, where there is no volitional impairment, but only a showing of dangerousness, there can be no "disorder" or "illness" to treat or cure, thus involuntary commitment becomes but a sham for punitive, unjustified preventive detention. *See id.* at 382 (Breyer, J., dissenting). Clearly, such a scheme renders conditions of confinement both an arbitrary exercise of state power, and punitive in purpose and effect.[10] *Cf. Allen v. Illinois*, 478 U.S. 364, 370-73 (1986).

C. State Legislatures and the Lower Courts Have Failed to Require Lack of Volitional Control

Amicus respectfully submits that, since *Hendricks*, both the state legislatures and the lower courts have failed to define with sufficient precision the mental abnormality requirement and, in so doing, have failed to recognize the constitutional significance of the volitional control standard. They have thereby also failed to articulate the practical content of the constitutional requirement that a civil committee "lack volitional control" before he can be civilly committed. Thus, despite this Court's long-standing recognition that dangerousness alone is insufficient to justify involuntary civil detention, predictions of violence alone have effectively become the leitmotif of constitutionality.

A particularly good example of the problem arose in Minnesota, where the state Supreme Court struggled with the question of whether *Hendricks* required the state to show a "total" lack of control before a person could be civilly committed. In *Linehan IV*, 595 N.W.2d at 873-76, the court considered a challenge under the United States Constitution

---

[10] This conclusion is not undermined by the majority's opinion in *Hendricks*. To the contrary, the Court held only because Hendricks' condition could not be treated, the Constitution did not require his release for the state's failure provide such treatment. *See Hendricks*, 521 U.S. at 364. The Court, however, has not concluded that where treatment is available and efficacious, the state is under no constitutional obligation to provide it.

to its state's Sexually Dangerous Person Act, which provides, in pertinent part, that, in defining whether an individual is a "sexually dangerous person," "it is not necessary to prove that the person has an inability to control [his or her] sexual impulses." MINN. STAT. ANN. § 253B.02(18)(c)(b) (West 1999).

Over a vigorous dissent, a majority of the court rejected the application of the *Pearson*[11] "utter lack of control" test and held that, while "some degree of volitional control must be evidenced to satisfy substantive due process," neither *Hendricks* nor the Due Process Clause requires a finding of total lack of control before civil detention can be justified. *Linehan IV*, 594 N.W.2d at 873-76. Rather, the court determined that because *Hendricks* required only a finding of future dangerousness, linked to a "mental abnormality" or "personality disorder" ""that makes it difficult, if not impossible, for the person to control his dangerous behavior,"" the state Legislature was free to abandon the "utter lack of control" test required by decisional law for other civil commitments. *Id.* (quoting *Hendricks*, 521 U.S. at 358).

Thus, according to the Minnesota court, involuntary civil commitment is justified where sexually dangerous persons who have engaged in a prior course of sexually harmful behavior cannot *adequately control* their sexual impulses by reason of a present disorder or dysfunction. *See Linehan IV*, 594 N.W.2d at 876. Unfortunately, the court did not specify what degree of control constitutes adequate control. This has proved to be a pervasive reaction to the "mental abnormality" standard following *Hendricks*. Although it may be true that a constitutional requirement of "total" lack of control would prove unworkable, the failure of state legislatures and lower courts to specify what level of "lack of

---

[11] 309 U.S. at 271-72.

control" must be proven by the state effectively eviscerates this factor's narrowing function.

Similarly, the California Supreme Court in *Hubbart*, failed to articulate with sufficient precision the constitutional content of the mental abnormality standard. In that case, the court construed the meaning of "diagnosed mental disorder" under California law and determined that, because the "Act targets sexual offenders who suffer from a diagnosed 'volitional impairment' making them 'dangerous beyond their control,'" the Act's language comports fully with the requirements of substantive due process.[12] *Hubbart*, 969 P.2d at 596 (quoting *Hendricks*, 521 U.S. at 358). However, while the court in *Hubbart* recognized that due process requires an inability to control dangerous conduct, and upheld against a facial challenge a provision requiring just that, nothing surrounding the facts of Hubbart's commitment indicates that *his* lack of volitional control was established beyond a reasonable doubt. *See Hubbart*, 969 P.2d at 591-92. The court did not suggest otherwise.

Finally, in at least one state, North Dakota, the Legislature has failed to provide any statutory definition whatsoever for "mental abnormality." *See* N.D. CENT. CODE § 25-03.3-01(7) (1999). The courts of that state have fared no better. *See, e.g., In the Interest of M.D.*, 598 N.W.2d

[12] Several states have adopted substantially similar, if not identical definitions. *See e.g.*, FLA. STAT. ANN. § 394.912(5) (West 1999); IOWA CODE ANN. § 229A.2(4) (West 1999); ILL. COMP. STAT. § 207/5(b) (West 1999); KAN. STAT. ANN. § 59-29a02(b) (West 1999); MASS. GEN. LAWS, ch. 6, § 178C (1999); MO. ANN. STAT. § 632.480(2) (West 1999); MINN. STAT. ANN. § 253B.02(18)(c) (West 1999); N.J. STAT. ANN. § 30:4-27.26 (West 1999); S.C. CODE ANN. § 44-48-30(1)(b) (1999); VA. CODE ANN. § 37.1-70.1 (Michie 1999); WIS. STAT. ANN. § 980.01(2) (West 1999); *see also* TEX. HEALTH & SAFETY CODE ANN. § 841.002(2) (West 1999) (defining "behavioral abnormality" as a "congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person").

799, 807-08 (N.D. 1999). And, perhaps even more troubling, Arizona's Sexually Violent Persons Statute tautologically provides that "mental disorder" means a "paraphilia, personality disorder or conduct disorder or any combination [thereof] that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others." ARIZ. REV. STAT. ANN. § 36-3701(5) (West 1999). Thus, in Arizona, involuntary civil commitment is justified where, based on past acts of sexual misconduct, a person is diagnosed with a personality disorder, which, in turn, renders him likely to engage in future acts of sexual misconduct.[13]

As *Hendricks* makes clear, for a person to be civilly committed as a sexually violent person, the Constitution requires the state to prove, by the requisite burden of proof, two independent facts: (1) that the defendant is dangerous, *and* (2) that his dangerousness is not within his volitional control. While *Hendricks* gives the states some discretion to define "the additional factor" of "mental abnormality," it does not permit them to do so in a way that eviscerates it as a requirement. Yet a review of the various laws shows that too many states and courts have done just that. The definition of "mental abnormality" as written and applied has collapsed the two requirements into one—proving that the individual is dangerous. Experience has demonstrated the prescience of Justice Kennedy's concern in *Hendricks*

[13] That result is not altered by the mere fact that Arizona requires as a predicate to commitment a diagnosed paraphilia, personality disorder, or conduct disorder. To the contrary, the DSM-IV expressly concedes:

> The fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

DSM-IV, *supra*, at xxiii.

that "mental abnormality" might prove to be "too imprecise a category" to satisfy the Constitution. *Hendricks*, 521 U.S. at 374 (Kennedy, J., concurring).

Volitional control falls along a spectrum from total control to total lack of control. The states should be constitutionally required to specify what degree of lack of control their statutes require. Moreover, the degree of lack of control required must be substantial. From a constitutional perspective, based on the logic of *Hendricks*, volitional control and the objectives of the criminal law, deterrence and retribution, are inversely related. The more control a person exerts over his behavior, the less justification there is for civil commitment. The states' failure to define operationally the lack of control core of "mental abnormality," and their failure to require that this factor be proved independently by sufficient evidence, renders their commitment schemes unconstitutional.

D. Application to Mr. Young of the Washington Act Violates the Constitution

Without repeating the points that Mr. Young has argued in his own behalf, *Amicus* respectfully submits that its analysis shows that there is an independent basis for affirming the decision below.[14]

Similar to the Minnesota and California statutes, Washington's Sexually Violent Predators Act defines "mental abnormality" as "a congenital or acquired condition *affecting the emotional or volitional capacity* which predisposes the person to the commission of criminal sexual acts." WASH. REV. CODE ANN. § 71.09.020(2) (emphasis added). Contrary to the Court's analysis in *Hendricks*, nothing in Washington's statute expressly requires the

[14] *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (stating that "[a]s the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

State to demonstrate a lack of volitional control before civil detention is justified. Rather, a person can be indefinitely committed merely upon proof that he failed to exercise control, whether or not with some degree of emotional or volitional choice. More significantly, Washington courts have failed to read *Hendricks* as establishing lack of volitional control as a constitutional standard.

In rejecting Mr. Young's claim that the Washington courts' interpretation of the term "mental abnormality" is unconstitutionally vague, the Ninth Circuit summarily concluded that, "while the statute's failure to limit its reach to those who completely lack control may be an indicia of a forbidden deterrent purpose, this failure does not, by itself, render the statute unconstitutional." *Young v. Weston*, 192 F.3d 870, 876 (9th Cir. 1999), *cert granted sub nom. Seling v. Young*, 120 S. Ct. 1416 (2000). Thus, according to the court, civil commitment can be justified absent a showing that Mr. Young lacked the ability to control his sexual dangerousness.[15] In this regard, the law of Washington as it was construed and applied to the facts of Mr. Young's case fails to conform to the precedents of this Court. The Ninth Circuit's failure to require proof of Mr. Young's lack of volitional control as a constitutional predicate to

[15] Further underscoring the need for clarification, in *In re the Detention of Brooks*, 973 P.2d 486, 492-93 (Wash. Ct. App.), *review granted sub nom. Brooks v. State*, 989 P.2d 1136 (Wash. 1999), the court construed the meaning of "mental abnormality" under Washington law and concluded that no showing of lack of volitional control is required by the Constitution. In so holding, the court conceded that the statutory requirement of "mental abnormality" limits "'involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.'" *Id.* at 492 (quoting *Hendricks*, 521 U.S. at 358). Nevertheless, the court determined that nothing in *Hendricks* requires a "total lack of control," rather, the state need only demonstrate that a "mental abnormality" makes it "'difficult, if not impossible, for the person to control his dangerous behavior.'" *Id.* Again, other than this passing tip of the hat to *Hendricks'* "lack of control" language, the court provided absolutely no guidance to a committing court regarding how to concretely define this constitutional requirement.

confinement violates substantive due process, the guarantee against double jeopardy and the Ex Post Facto Clause.

This Court's holding in *Hendricks* does not alter the result. To the contrary, the facts of that case unquestionably distinguish it from the one now before the Court. First, Mr. Hendricks was diagnosed as suffering from pedophilia, a condition the psychiatric community itself defines as a serious mental disorder. *See Hendricks*, 521 U.S. at 360. In sharp contrast, Mr. Young's initial, and more importantly, continuing commitment is based on an unrecognized combination of diagnoses, neither of which standing alone would necessarily justify his current commitment. *Cf. id. at* 360 (commitment of diagnosed pedophile); *Heller*, 509 U.S. at 315 (commitment of "mentally retarded" or "mentally ill" individual); *Allen*, 478 U.S. at 366 (commitment of "mentally ill"). Indeed, one aspect of Mr. Young's alleged condition, the "paraphilia not otherwise specified, rape," is not specifically recognized in the DSM-IV, and is, according to the State's testifying expert, controversial within the scientific community.

Second, unlike Leroy Hendricks, Mr. Young never conceded a lack of volitional control. Indeed, that crucial fact was never established at trial, and neither the trial court nor the testifying expert ever made findings regarding Mr. Young's ability to control his behavior. Rather, Mr. Young was, and is, currently committed absent proof that he suffers from any lack of volitional control. That is in sharp contrast to Hendricks' *admitted* lack of volitional control, which the Court clearly viewed as essential to its holding: "this admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Hendricks*, 521 U.S. at 360.

Third, the second component of Mr. Young's diagnosis, "personality disorder not otherwise specified," is not a

constitutionally adequate grounds for continuing civil commitment. That diagnosis sweeps within its reach *all* sexually dangerous offenders who happen to suffer "significant distress or impairment in one or more important areas of functioning" and, in so doing, fails to distinguish among the limited subclass of criminals who are unable to control their behavior. *Cf. Hendricks*, 521 U.S. at 360; *Foucha*, 504 U.S. at 82-83.

Here too, the facts of *Hendricks* are distinguishable. There, the Court assessed the constitutionality of Hendricks' commitment based on his diagnosed pedophilia. No claim was made that Hendricks suffered from a personality disorder. As such, the Court did not consider the constitutionality of commitment based on a finding of personality disorder and, more significantly, did not overrule its prior ruling of *Foucha*, wherein the Court expressly rejected as sufficient a diagnosis of "antisocial personality disorder." *Foucha*, 504 U.S. at 77-79. Here, as in *Foucha*, continuing commitment on the basis of a "personality disorder," is, essentially, commitment on the basis of future dangerousness alone. *See id.*

Finally, the State's failure to establish Mr. Young's lack of volitional control, or even *any* additional factor over and above a showing of dangerousness, is inextricably linked to his conditions of confinement. Because his current commitment is unconstitutional, the *nature* of his confinement bears no reasonable relationship to the *purposes* of that confinement. Absent proof of Mr. Young's lack of volitional control, the conditions of his confinement cannot be linked to the stated purposes of his commitment, namely treatment. Thus, in this case, there are no means of furthering legitimate state objectives necessary for justifiable civil commitment. And, as a result, all that remains is arbitrary, punitive preventive detention, which is itself an unconstitutional condition of confinement.

Moreover, *Foucha* unquestionably requires that once a committee is no longer mentally ill, involuntary civil commitment is no longer justified and he must be released. So too, where, as here, the State has failed to establish anything more than a record of past convictions, Mr. Young's current confinement can no longer stand. Thus, in direct contravention of *Foucha* and *Hendricks*, Mr. Young is currently confined on the basis of his potential for dangerousness alone; therefore, his continuing confinement is unconstitutional.

At base, Washington's sexually violent predator statute, as it was construed and implemented, evidences a punitive purpose and effect, and illustrates that the ostensibly legitimate goal of treatment can be but a pretext for punishment. Furthermore, Mr. Young's continuing commitment is based on mere predictions of violence, which undoubtedly fails to comport with substantive due process and contravenes the express holdings of this Court.

Mr. Young was, and continues to be, involuntarily committed without any proof that he suffers from any lack of volitional control. His continuing confinement is unconstitutional unless, and until, the state proves that he is both sexually dangerous and unable to control his dangerous behavior. Because the state failed to carry its heavy burden, Mr. Young is entitled to an individualized evidentiary hearing for a determination of whether he is, in fact, "mentally abnormal" within the meaning of the United States Constitution.

CONCLUSION

Amicus does not question that the states have the discretion to define legally significant terms of a medical nature. But they must do so within the confines of the United States Constitution, and as demonstrated above, Washington and too many other states have failed in that regard. They have, instead, adopted definitions of "mental abnormality" that have effectively eviscerated that term as

a limiting "additional factor." As is well illustrated by Mr. Young's case, the states have permitted "mental abnormality" to become so "imprecise a category" that civil detention has become criminal punishment. As a result, Mr. Young, and too many others in too many states, have been civilly committed for indefinite periods with no meaningful proof that they lack volitional control. They have been committed solely on the ground that they are dangerous.

Amicus, therefore, respectfully urges the Court to clarify the constitutional role for mental abnormality as it was previously articulated in *Hendricks* and to reiterate the constitutional significance of the lack of volitional control standard.

Furthermore, because Washington's sexually violent predator statute, as it is has been defined and applied to Mr. Young, violates the Due Process, Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, *Amicus* respectfully requests that the Court affirm the holding of the Ninth Circuit below.

Respectfully submitted,

JOEL E. KRISCHER*
KATHRYN M. DAVIS
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

* Counsel of Record for *Amicus Curiae* California Atascadero State Hospital Section 6600 Civil Committees